IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

C.E.A. No. 5 of 2007
DATE OF DECISION: 28.8.2007

Commissioner of Central Excise, Ludhiana

…Appellant

Versus

M/s Omkar Steel Tubes (P) Ltd. and another

…Respondents

**CORAM: HON'BLE MR. JUSTICE M.M. KUMAR**

**HON'BLE MR. JUSTICE AJAY KUMAR MITTAL**

Present: Mr. Rahul Sharma, Advocate,
for the appellant-revenue.

**JUDGMENT**

**M.M. KUMAR, J.**

This appeal filed by the appellant-revenue under Section 35G of the Central Excise Act, 1944 (for brevity, 'the Act'), challenges order dated 1.6.2006, passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi (for brevity, 'the Tribunal). It has been claimed that the following questions of law would arise for determination of this Court:-

"(i) Whether equal penalty under Section 11AC is liable to be imposed on the assessee in those cases which fall under the purview of Explanation (1) to Sub-section 2(B) of Section 11A of the Central

Excise Act, 1944, where duty has been deposited before issue of show cause notice?

(ii) Whether the CESTAT is justified in waiving the penalty imposed on the Director of the party under Rule 26 of the Central Excise Rules particularly when he had admitted the shortage of the goods detected by the Central Excise Staff and the clandestine removal of the goods could not be carried out without his knowledge and connivance?"

M/s Omkar Steel Tubes (P) Limited are registered under the Central Excise. It is engaged in the manufacture of Non-Alloy Steel Pipes falling under sub-heading 7306-90 of the Central Excise Tariff Act, 1985. The Central Excise Prevention Staff when visited the factory of the respondent, had detected a shortage of 59.730 MT of stocks of steel pipes (steel scrap) valued at Rs. 13,14,600/-, which involve the incidence of duty amounting to Rs. 2,14,455/-. The above shortage was conceded by respondent No. 2 who is the Director of the Company-respondent No. 1 and deposited the amount of Rs. 2,14,455/-. A show cause notice for confirming duty under Section 11A of the Act, charging of interest under Section 11AB of the Act and proposing penalty under Section 11AC of the Act, was issued to the Company-respondent No. 1. The Adjudicating Authority in his Order-in-Original, dated 13.8.2005, confirmed the duty of Rs. 2,14,445/- under Section 11A of the Act and the amount since already paid was ordered to be appropriated. He also imposed a penalty of Rs. 10,000/- on respondent No. 1 under Rule 25 of the Central Excise

Rules, 1944, and a penalty of Rs. 10,000/- was also imposed on the Director-respondent No. 2 (P-1).

On appeal filed by the assessee-respondent, the Commissioner (Appeals), vide his order dated 13.2.2006, set aside the penalty imposed on respondent Nos. 1 and 2 by upholding the demand of duty which was deposited by the assessee-respondent No. 1 before issuance of show cause notice (P-2). The appellant-revenue challenged the order on further appeal to the Tribunal. The appeal was dismissed vide order dated 1.6.2006 by adopting the rationale that once the amount of duty has been paid before the issuance of show cause notice then no penalty was leviable. The Tribunal in that regard placed reliance on its larger bench decision in the case of Machino Montell, 2004 (62) RLT 709 (P-3).

Mr. Rahul Sharma, learned counsel for the appellant-revenue has submitted that the order passed by the Tribunal is primarily based on an earlier order passed by a larger bench of the Tribunal in Machino Montell case (supra) and that the aforementioned view of the Tribunal has been overturned by a Division Bench of this Court in the case of **Commissioner of Central Excise Delhi-III v. M/s Machino Montell (I) Ltd. and another (C.E.A. No. 13 of 2005, decided on 25.7.2006)**, holding that merely because the amount of duty has been deposited prior to issuance of show cause notice under Section 11A of the Act would not necessarily result into non-application of Section 11AC of the Act and, therefore, learned counsel has maintained that order dated 1.6.2006 (P-3), passed by the Tribunal is liable to be set aside.

After hearing learned counsel we are of the considered view that this appeal is devoid of merit and, thus, liable to be dismissed. It would be appropriate to firstly read Section 11AC of the Act, which is as under:-

> "**11AC. Penalty for short-levy or non-levy of duty in certain cases:-** Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reasons of fraud, collusion or any willful mis-statement or suppression of facts or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under sub-section (2) of section 11A, shall also be liable to pay a penalty equal to the duty so determined:
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> Provided that where such duty as determined under sub-section (2) of section 11A, and the interest payable thereon under section 11AB, is paid within thirty days from the date of communication of the order of the Central Excise Officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent of the duty so determined:
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> Provided further that the benefit of reduced penalty under the first proviso shall be available if the amount of penalty so determined has also been paid

within the period of thirty days referred to in that proviso:

Provided also that where the duty determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, for the purposes of this section, the duty, as reduced or increased, as the case may be shall be taken into account:

Provided also that in case where the duty determined to be payable is increased by the Commissioner (Appeal), the Appellate Tribunal or, as the case may be, the court, then, the benefit of reduced penalty under the first proviso shall be available, if the amount of duty so increased, the interest payable thereon and twenty-five per cent of the consequential increase of penalty have also been paid within thirty days of the communication of the order by which such increase in the duty takes effect.

**Explanation:** - For the removal of doubts, it is hereby declared that-

(1) the provisions of this section shall also apply to cases in which the order determining the duty under sub-section (2) of section 11A relates to notices issued prior to the date on which the Finance Act, 2000 receives the assent of the President;

(2) any amount paid to the credit of the Central Government prior to the date of communication of the

order referred to in the first proviso or the fourth proviso shall be adjusted against the total amount due from such person."

It is evident that non-levy or short levy of duty or erroneous refund of duty has to be for reasons of fraud, collusion or any ulterior misstatement or suppression of facts or contravention of the provisions of the Act or the Rules made thereunder. The provision further require that aforementioned short levy or non-levy etc. has to be with the intention to evade payment of duty. In other words, the element of *mens rea* has to be present. It would, thus, be necessary that the authorities under the Act must record a finding that non-levy of duty or short levy of duty etc. was actuated by the intention to evade payment of duty. When the order dated 13.8.2005, passed by the Adjudicating Authority(P-1), order dated 13.2.2006, passed by the Appellate Authority (P-2) and order dated 1.6.2006, passed by the Tribunal (P-3), are examined in the light of Section 11AC of the Act, no finding has been recorded regarding *mens rea* or any intention on the part of the assessee that the goods were removed with the intention to evade payment of duty. The Adjudicating Authority merely makes a reference to the statement of the assessee tendered under Section 14 of the Act. Shri Shankar Lal, Director-respondent No. 2, has stated that he was not in a position to reveal the whereabouts of the steel pipes nor he could furnish any reason for the shortage. He had asked for a lenient view on account of weak financial position of the company and requested for a period of six months to deposit the duty leviable on the missing steel pipes. The

Adjudicating Authority by referring to the statement made by the Director-respondent No. 2, has held that he was responsible for taking care of the stock of goods and his inability 'to explain shortage of goods itself proved that the goods were removed clandestinely without payment of duty and without accountal (accounting?) in the record'. Such a statement cannot be regarded as sufficient to conclude that there was *mens rea* on the part of the Director-respondent No. 2. In any case, we cannot substitute the findings recorded by the Adjudicatory Authority which shows that no finding has been recorded that there was *mens rea* on the part of the Director-respondent No. 2. Therefore, there is no merit in the appeal and the same is liable to be dismissed.

It is true that the view taken by the Tribunal in the case of Machino Montell (supra) was applied which has been overturned by a Division Bench of this Court in the case of Commissioner of Central Excise Delhi-III v. M/s Machino Montell (I) Ltd. and another (C.E.A. No. 13 of 2005, decided on 25.7.2006), therefore, the mere fact that duty has been paid before issuance of show cause notice would not result into in-application of Section 11AC of the Act and the penalty could still be imposed as long as various elements envisaged by Section 11AC of the Act are satisfied including presence of *mens rea*. Therefore, reversal of view in the case of Machino Montell (supra) by a Division Bench of this Court would not materially affect the result of the instant appeal.

For the reasons aforementioned, this appeal fails and the same is dismissed.

**(M.M. KUMAR)**
**JUDGE**

**(AJAY KUMAR MITTAL)**
**JUDGE**

**August 28, 2007**
Pkapoor

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